HSBC Bank Malaysia Bhd v Dharani Sugars & Chemical Ltd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(I)-9 OF 2009(W) AND 02(I)-10 OF 2009(W)
ARIFIN ZAKARIA CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND JAMES FOONG FCJ
27 JULY 2010

Banking — Banks and banking business — Documentary credit — Letter of credit, irrevocable — Bills of lading presented for payment under letter of credit rejected by bank — Whether bank wrongly rejected bills of lading — Whether bank could refuse payment on grounds that bill of lading subject to charter party — Whether bank could refuse payment of bill of lading which only contained signature of agent without indicating on whose behalf agent was acting — Whether breach of articles 23 and 25 of the Uniform Customs and Practice for Documentary Credits (UCP 500)

Shipping and Navigation — Carriage of goods — Bill of lading — Whether bank wrongly rejected bills of lading — Whether bank could refuse payment on grounds that bill of lading subject to charter party — Whether bank could refuse payment of bill of lading which only contained signature of agent without indicating on whose behalf agent was acting — Whether breach of articles 23 and 25 of the Uniform Customs and Practice for Documentary Credits (UCP 500)

The instant judgment concerned two appeals which arose from similar facts and involved the same parties. Dharani Sugars & Chemical Ltd ('the plaintiff/respondent'), a company incorporated in India agreed to supply Global Multi Exim Sdn Bhd ('Global'), a Malaysian company, 3500 tonnes of Indian white crystal sugar ('cargo') on free on board terms ('FOB') at the price of US$784,000. It was a term of the contract that the payment of the contract price would be by way of a 100% irrevocable letter of credit drawn on the HSBC Bank Malaysia Bhd ('HSBC'), the respondent/first defendant. As the contract was premised on FOB terms, Global as the buyer was required to nominate and send a vessel to the port of shipment to load the cargo. Accordingly, Global entered to a charter party agreement for the carriage of the cargo and stipulated M/S Unicorn Maritimes (India) Pvt Ltd ('the agent') to be its agent. By way of an automated international transfer system ('SWIFT') transmission HSBC informed its negotiating bank, the State Bank of India, of the irrevocable credit which was opened by Global in favour of the plaintiff/respondent for the amount of US$784,000. Relying on the letter of credit the plaintiff/respondent shipped the cargo on board the vessel

nominated by Global. Subsequently when the plaintiff/respondent presented the relevant documents to the State Bank of India for negotiation with a view for payment under the letter of credit, HSBC rejected the bills of lading and refused payment. The plaintiff/respondent then commenced an action against HSBC and Global, as first and second defendants respectively, for the recovery of payment under the irrevocable letter of credit. The plaintiff/respondent alleged that the non-payment occurred when HSBC wrongly rejected the bills of lading that related to the supply of the cargo. HSBC argued that the documents presented by the plaintiff/respondent had not fulfilled the terms of the letter of credit, namely, that the bill of lading was 'subject to a charter party' and that the bill of lading which was signed by an agent did not indicate the name of the master on whose behalf that agent was acting. It was HSBC's contention that these two discrepancies entitled it to refuse payment on the letter of credit. HSBC's application to strike out the plaintiff/respondent's action against it was allowed by the senior assistant registrar ('SAR') but on appeal the High Court reversed the decision. On further appeal the Court of Appeal affirmed the decision of the High Court. This was an appeal by HSBC against that decision ('the first appeal'). At the same time the plaintiff/respondent had applied for summary judgment to be entered against HSBC but the SAR disallowed it and on appeal the High Court held that the matter should go for full trial. However, the Court of Appeal found that the documents presented by the plaintiff/respondent to HSBC had fulfilled the terms of the letter of credit and that articles 23 and 25 of the Uniform Customs and Practice for Documentary Credits (UCP 500), which regulated the letter of credit, did not apply. Hence the Court of Appeal allowed summary judgment to be entered against HSBC. This was HSBC's appeal against that decision ('the second appeal'). HSBC was granted leave to appeal on two questions of law, namely whether an issuer of a letter of credit could refuse payment on the ground that that the bill of lading was subject to a charter party and whether an issuer of a letter of credit could refuse payment because the bill of lading which was signed by an agent did not indicate the name of the master on whose behalf that agent was acting, and thus was in breach of articles 23(a)(i) and 25(a)(ii) of the UCP 500.

Held, allowing the appeals with costs:

(1) In these appeals the bills of lading were accepted as charter party bills of lading while the letter of credit did not indicate that charter party bills of lading were permitted. The letter of credit only stipulated for 'original, clean, on board' bills of lading without calls for a charter party bill of lading. As a bill of lading subject to a charter party was not stipulated in the letter of credit, the issuing bank, HSBC, could rely on article 23(a)(vi) of the UCP 500 to reject the bills of lading for non-compliance. The Court of Appeal erred in finding that the bills of lading had fulfilled the terms of the letter of credit when they had in fact not done so.

Further, the Court of Appeal was erroneous in saying that the mere presentation of the bills of lading irrespective of their nature satisfied the terms of the letter of credit. Thus, importance should have been given to the fact that the bills of lading were subject to charter party and that the letter of credit did not provide acceptance for such type of bills of lading (see paras 32–38).

(2) The Court of Appeal's interpretation of article 23 (a)(vi) of the UCP 500 was flawed because it reversed the effect of the stipulations and the exception given in the said article. The interpretation of the Court of Appeal that the article only applied if a letter of credit stipulated for the production of a bill of lading which was not subject to a charter party was also not in tandem with the views of some learned authors on the same subject. Thus, HSBC had the right to reject the bills of lading on the grounds that they were subject to charter party bills of lading (see paras 39–41).

(3) The bills of lading only contained the signatures of the agent but did not indicate on whose behalf the agent was acting. Thus there was nothing on the face of the bill of lading to indicate the name and capacity of the party on whose behalf the agent was acting for. There was also no indication in the letter of credit as to whether such an omission was allowed or permitted. There was therefore a failure to comply with articles 23(a)(i) and 25(a)(ii) of the UCP 500 and it followed that HSBC had a right to reject the bills of lading for the said discrepancy (see paras 48–51).

[Bahasa Malaysia summary

Penghakiman ini berkaitan dua rayuan berbangkit daripada fakta-fakta yang sama dan melibatkan pihak-pihak yang sama. Dharani Sugars & Chemical Ltd ('plaintif/responden'), syarikat yang ditubuhkan di India bersetuju membekalkan Global Multi Exim Sdn Bhd ('Global'), sebuah syarikat Malaysia, 3,500 tan gula white crystal ('kargo') atas terma percuma ke atas kapal ('FOB') pada harga US$784,000. Adalah menjadi terma kontrak bahawa bayaran harga kontrak adalah melalui cara 100% surat kredit tak boleh mansuh dikeluarkan oleh HSBC Bank Malaysia Bhd ('HSBC'), responden/defendan pertama. Memandangkan kontrak tersebut bersandarkan kepada terma-terma FOB, sebagai pembeli, Global dikehendaki melantik dan menghantar sebuah kapal ke pelabuhan untuk memuatkan kargo tersebut. Kemudiannya, Global menandatangani perjanjian carter parti bagi pengangkutan kargo tersebut dan menetapkan M/S Unicorn Maritimes (India) Pvt Ltd ('ejen') menjadi ejennya. Menerusi pindahan 'automated international transfer system' ('SWIFT') HSBC memaklumkan bank perunding, State Bank of India, kredit tak boleh mansuh yang dibuka oleh Global bagi pihak plaintif/responden untuk sejumlah US$784,000. Bergantung kepada surat kredit plaintif/responden menghantar kargo tersebut ke atas kapal yang dilantik oleh Global. Selepas itu, apabila plaintif/responden

menyerahkan dokumen-dokumen yang relevan kepada State Bank of India untuk perbincangan dengan niat untuk pembayaran menerusi surat kredit, HSBC menolak bil-bil muatan dan enggan membuat pembayaran. Plaintif/responden kemudian memulakan tindakan terhadap HSBC dan Global, sebagai defendan-defendan pertama dan kedua, untuk mendapatkan bayaran menerusi surat kredit tak boleh mansuh. Plaintif/responden mendakwa bahawa ketidakpembayaran itu berlaku apabila HSBC telah salah menolak bil-bil muatan yang berkait dengan pembekalan kargo tersebut. HSBC menghujah bahawa dokumen-dokumen yang diserahkan oleh plaintif/responden tidak memenuhi terma-terma surat kredit, iaitu bahawa bil-bil muatan tersebut 'subject to a charter party' dan bahawa bil muatan yang ditandatangani oleh ejen tidak menyatakan nama prinsipal ejen tersebut. Menjadi hujahan HSBC bahawa kedua-dua kecacatan tersebut memberinya hak untuk tidak membuat pembayaran atas surat kredit tersebut. Permohonan HSBC untuk membatalkan tindakan plaintif/responden terhadapnya dibenarkan oleh penolong kanan pendaftar ('PKP') tetapi semasa rayuan, Mahkamah Tinggi mengakas keputusan tersebut. Dalam rayuan selanjutnya, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Ini adalah rayuan oleh HSBC terhadap keputusan tersebut ('rayuan pertama'). Pada masa yang sama, plaintif/responden memohon penghakiman terus dimasukkan terhadap HSBC tetapi PKP menolaknya dan dalam rayuan, Mahkamah Rayuan memutuskan bahawa perkara tersebut harus didengar sepenuhnya. Tetapi, Mahkamah Rayuan mendapati bahawa dokumen-dokumen yang diserahkan plaintif/responden kepada HSBC telah memenuhi terma-terma surat kredit dan bahawa artikel-artikel 23 dan 25 Uniform Customs and Practice for Documentary Credits ('UCP 500)', yang mentadbir surat kredit, tidak terpakai. Maka, Mahkamah Rayuan membenarkan penghakiman terus dimasukkan terhadap HSBC. Ini merupakan rayuan HSBC terhadap keputusan tersebut ('rayuan kedua'). HSBC diberikan izin untuk merayu atas dua persoalan perundangan, iaitu, sama ada pengeluar surat kredit boleh tidak membayar atas dasar bahawa bil muatan tertakluk kepada carter parti dan sama ada pengeluar surat kredit boleh tidak membayar disebabkan bil muatan yang ditandatangani oleh ejen tidak menyatakan nama prinsipal ejen tersebut, dan oleh itu melanggar artikel-artikel 23(a)(i) dan 25(a)(ii) UCP 500.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Dalam rayuan-rayuan ini, bil-bil muatan diterima sebagai bil-bil muatan carter parti sementara surat kredit tidak menyatakan bahawa bil-bil muatan carter parti dibenarkan. Surat kredit hanya menyatakan bahawa untuk 'original, clean, on board' bil-bil muatan tanpa memerlukan bil-bil muatan carter parti. Disebabkan bil muatan tertakluk kepada carter parti tidak diperuntukkan dalam surat kredit, bank yang mengeluarkannya, HSBC, boleh bergantung kepada artikel 23(a)(vi) UCP 500 untuk menolak bil-bil muatan kerana ketidakpatuhan. Mahkamah Rayuan

khilaf dalam memutuskan bahawa bil-bil muatan memenuhi terma-terma surat kredit apabila bil-bil muatan tersebut tidak begitu. Mahkamah Rayuan juga khilaf apabila mengatakan bahawa penyerahan bil-bil muatan itu semata-mata tanpa mengambilkira sifatnya memenuhi terma-terma surat kredit. Oleh itu, kepentingan harus diberikan kepada fakta bahawa bil-bil muatan tersebut tertakluk kepada carter parti dan bahawa surat kredit tersebut tidak memperuntukkan penerimaan bil-bil muatan yang sebegitu (lihat perenggan 32–38).

(2) Tafsiran Mahkamah Rayuan atas artikel 23(a)(vi) UCP 500 adalah cacat kerana menterbalikkan kesan ketetapan dan pengecualian yang diberikan oleh artikel tersebut. Tafsiran Mahkamah Rayuan bahawa artikel tersebut hanya terpakai jika surat kredit menetapkan pengeluaran bil muatan yang tidak tertakluk kepada carter parti juga tidak selari dengan pandangan beberapa penulis terpelajar dalam hal perkara yang sama. Oleh itu, HSBC berhak menolak bil-bil muatan atas dasar bahawa bil-bil tersebut tetakluk kepada bil-bil muatan carter parti (lihat perenggan 39–41).

(3) Bil-bil muatan hanya mengandungi tandatangan-tandatangan ejen tetapi tidak menyatakan bagi pihak siapakah ejen tersebut wakili. Oleh itu, tidak ada di atas bil muatan tersebut yang menyatakan nama dan kapasiti pihak yang diwakili ejen tersebut. Juga tiada arahan dalam surat kredit tersebut sama ada peninggalan itu dibenarkan. Oleh itu, terdapat kegagalan mematuhi artikel-artikel 23(a)(i) dan 25(a)(ii) UCP 500 dan maka, HSBC berhak menolak bil-bil muatan bagi kecacatan yang sedemikian (lihat perenggan 48–51).]

Notes

For cases on bill of lading, see 11 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1221–1325.

For cases on documentary credit, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1927–1940.

Cases referred to

Banque De L'indochine Et De Suez SA v JH Rayner (Mincing Lane) Ltd [1983] QB 711, CA (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Equitable Trust Co of New York v Dawson Partners Ltd (1926) 27 Ll L Rep 49, HL (refd)

Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd [2003] SGCA 34 [2003] 3 SLR 556, CA (refd)

Glencore International AG and another v Bank of China [1996] 1 Lloyd's Rep 135, CA (refd)

Lee Nyan Choi v Voon Noon [1979] 2 MLJ 28, FC (refd)

A *Southland Rubber Co Ltd v Bank of China* [1997] 3 HKC 569; [1997] HKLRD 1300, HC (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87 (refd)

Legislation referred to

B Courts of Judicature Act 1964 s 96

Appeal from: Civil Appeal Nos W-03–391 of 2005 and W-03–12 of 2007 (Court of Appeal, Putrajaya)

C *Robert Lazar (Shearn Delamore & Co) for the appellant.*
Nagarajah Muttiah (M Kalaichelvan with him) (Abdul Halim Ushah & Associates) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

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INTRODUCTION

[1] There are two appeals before us.

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[2] One appeal relates to the summary application by the appellant to strike out the action against it by the respondent. It was allowed by the senior assistant registrar. On appeal the learned High Court judge reversed the decision which was affirmed by the Court of Appeal.

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[3] The other appeal is against the decision of the Court of Appeal which on appeal allowed summary judgment to be entered against the appellant. The respondent had applied for summary judgment before the senior assistant registrar who disallowed it. On appeal the decision was affirmed by the learned
G High Court judge who held that the matter should go for full trial.

[4] Dissatisfied with both decisions of the Court of Appeal the appellant applied for leave to appeal to this court.

H **[5]** On 25 February 2009 leave to appeal was granted to the appellant on the following questions:

(a) Whether an issuer of a letter of credit which calls for a full set of 'Original clean on board bills of lading' is obliged to accept a bill of lading that
I carries an indication that it is subject to a charter party; or conversely whether the Issuer can refuse payment on the ground that the bill of lading is subject to a charter-party; and

(b) Whether an issuer of a letter of credit is obliged to accept a bill of lading (whether subject to a charter party or otherwise), where the agent who indicates that is signing on behalf of the master does not indicate the name of the master on whose behalf that agent is acting.

[6] The appellant was the first defendant in the action by the respondent for the recovery of payment under an irrevocable letter of credit. It was alleged that the non-payment occurred when the appellant wrongly rejected the bills of lading related to the supply of 3500 metric tonnes of Indian white crystal sugar by the respondent to Global Exim Sdn Bhd a Malaysian company which was cited as the second defendant in the same action.

[7] In this judgment the appellant will be referred to as the defendant and the respondent as the plaintiff. The second defendant is not involved in these appeals.

BACKGROUND FACTS

[8] The plaintiff is a public listed company incorporated in India and having its registered address at PGP House, 57 Sterling Road, Nungambakkam, Chennai 600 034 and carrying business, inter alia, the manufacture of white crystal sugar.

[9] By a contract dated 28 September 2002 ('the contract') the plaintiff agreed to supply to the second defendant ('the buyer') 3500 tonnes of Indian white crystal sugar ('the cargo') on free-on-board ('FOB') term for the price of US$784,000 ('the contract price').

[10] It was a term in the contract that payment of the contract price was by way of a 100% irrevocable letter of credit drawn at sight on the defendant against the presentation of the following documents, inter alia:

(a) signed commercial invoices in triplicate;

(b) full set of original clean 'on board' (three originals plus three non-negotiable copies) bills of lading marked 'freight collect' made out to the order notify the applicant;

(c) certificate of origin issued and signed by the Chamber of Commerce;

(d) quality and analysis certificate issued by Geo-Chem Laboratories P Ltd in triplicate to show actual at the time of loading;

(e) health certificate in duplicate issued by the concerned government authority certifying that the produces were checked and found fit for human consumption; and

(f) packing list.

[11] As the said contract was premised on FOB term, the buyer was required to nominate and send a vessel to the port of shipment being Tuticorin, India for the plaintiff to load the cargo on board. Accordingly the buyer as charterers for the carriage of the cargo entered into a charterparty agreement dated 1 October 2002 with one M/S Vallibel Lanka (Pvt) Ltd as owners of a vessel MV Badulu Valley ('the vessel') and one M/S Corporate Shipping Agency (LCC) as commercial managers.

[12] It was also stipulated in the charterparty agreement that the owner's agents would be M/S Unicorn Maritimes (India) Pvt Ltd ('the agents').

[13] On 2 October 2002 the buyer confirmed the opening of letter of credit and disclosing the name and the date of sailing of the vessel.

[14] Subsequently, by way of an automated international transfer system (SWIFT) transmission dated 3 October 2002, the defendant informed its negotiating bank, the State Bank of India, ('the negotiating bank') through its main branch in Chennai, of the irrevocable credit which was opened by the buyer in favour of the plaintiff for the amount of USD784,000 (the letter of credit).

[15] Thus relying on the letter of credit and before its expiry the plaintiff shipped the cargo on board the vessel destined for Doha Qatar as the port of discharge.

[16] On 17 October 2002 the plaintiff presented the relevant documents to the negotiating bank for negotiation with a view for payment under the letter of credit.

[17] The documents presented were, inter alia:

(a) full set of three copies of bills of lading No 001 and No 002 both dated 15 October 2002 and for the amount USD448,000 and USD336,000 respectively together with the relevant accompanying documents;

(b) certificate of Indian origin No 225 dated 15 October 2002;

(c) quality and analysis certificate issued by M/S Geo-Chem Laboratories Pte Ltd in triplicate;

(d) beneficiary's certificate stating that a set of non-negotiable documents have been faxed at 603 20315395 and couriered directly to applicant within five working days after shipment;

(e) health certificate in duplicate certifying that the products were checked and found fit for human consumption;

(f) packing list in triplicate certifying that goods are packed in 50kg polylined PP bags and showing number of packages and the contents thereof;

(g) a certificate in duplicate issued by the plaintiff; and

(h) exchange control copy of shipping bill No 1128592 dated 9 October 2002.

[18] Despite the presentation of those documents including bills of exchange Nos 1081 and 1082 dated 17 October 2010 the defendant raised by way of advice of refusal the discrepancies as follows:

(i) CHARTER PARTY B/L NOT ALLOWED

(ii) MASTER NOT INDICATED ON B/L.

[19] As a result the plaintiff was not paid for the contract price and hence the action for payment was commenced.

BEFORE THE COURT OF APPEAL

[20] The decision of the Court of Appeal was unanimous. A concurring judgment was also rendered in support of the main judgment of the court.

[21] Briefly the Court of Appeal held that the documents presented by the plaintiff to the defendant had fulfilled the terms of the letter of credit. It was also held that articles 23 and 25 of the Uniform Customs and Practice for Documentary Credits (ICC Publication No 500) (commonly known as the 'UCP 500') which regulated the letter of credit, did not apply. The main judgment as well as the concurring judgment gave their respective reasons for their conclusions. However, the Court of Appeal did not address on the failure to indicate in the bills of lading the name and the capacity of the party on whose behalf the agent was acting for, the second discrepancy raised by the defendant. This issue is now posed in the form of question (b) before us.

BEFORE THIS COURT

[22] Before considering the questions posed it is apposite at the outset to state some pertinent preliminary points, namely:

(a) First, this court is being asked to consider decisions of the lower courts in relation to their exercise of summary jurisdiction. Inevitably the settled

principle of law comes to mind in that the 'power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases' (see *Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28). We are therefore inclined to agree with the view expressed by Gopal Sri Ram JCA (as he then was) in his separate concurring judgment when he said this:

> Suffice to say that the summary jurisdiction ought to be exercised only in plain and obvious cases, that is to say, cases in which there is no reasonable doubt. The jurisdiction is therefore not available against a litigant who is able to demonstrate the existence of a triable issue of fact or of mixed fact and law. But the jurisdiction is certainly available where the issue at stake falls to be determined on the construction of a few documents (see *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168) or the provisions of a statute (see *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196). The question here is whether it is appropriate to have resort to the summary jurisdiction on the peculiar facts common to these appeals.
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> … Whether the defendant's rejection was justified depends on the proper construction to be placed on article 23(a)(vi) of the UCP500.

(b) Second, shorn of any factual basis learned counsel for the plaintiff may be justified to say that the questions posed are too general in nature for the purpose of s 96 of the Courts of Judicature Act 1964. However, upon close scrutiny of the main judgment of the Court of Appeal and of the relevant documents tendered by the parties herein, there are undisputed facts and facts which can be safely inferred thereby rendering unnecessary a full blown trial. Indeed even this court is in the position to make or vary any finding of fact by the courts below where such fact is derived by inference (see *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517). Juxtaposed the questions with those facts it is quite obvious that the dispute of the parties herein could be summarily determined with finality. There is therefore no merit in the submission of learned counsel for the plaintiff that the questions posed should not be answered and that these appeals should be dismissed in limine.

QUESTION (A)

[23] In considering the appeals before it the Court of Appeal accepted that it was the plaintiff's case 'that the bills of lading in this case are charter party bills of lading. This is so since they contain an indication that it is subject to a charter party and that the letter of credit calls for and permits a charter party bill of lading.' In fact the Court of Appeal in its main judgment went on to make a finding that 'that the letter of credit calls for or permits charter party

bills of lading since it was issued pursuant to the terms of the contract, premised on an express FOB term, clearly calls for a reply from the first defendant. It has done so. However, in my view, article 23 of the UCP 500 does not apply.' A

[24] And in his submission before the Court of Appeal learned counsel for the plaintiff at paras 13.8 and 13.9 said that it 'is imperative to clarify the fact that the Bills of Lading are Charter Party Bills of Lading is not in dispute. The appellant too is aware and has admitted that the Bills of Lading are Charter Party Bills of Lading. It is therefore clear from the facts of the case herein that there is no ground for Article 23 UCP 500 to be invoked as it is neither relevant nor applicable in this instance.' B C

[25] Yet before us learned counsel for the plaintiff submitted thus:

(a) 'that the bill of lading tendered in this case, although labeled as a 'Charterparty bill of lading', is not as a matter of law a bill of lading which is 'subject to a Charterparty'; D

(b) that 'it is clear that the words 'subject to a Charterparty' must necessarily be understood to mean 'subject to the terms of a Charterparty';

(c) that it 'may be thought that the bill of lading in this case is subject to the terms of a charter-party simply because the Congenbill Form used states it is 'to be used with charterparties'. … this is a misconception, and that it is important not to be misled by this misconception.'; E

(d) that the mere fact that a bill of lading refers to a charter party does not render that bill of lading defective, provided that it is clear on the face of the bill of lading that the terms of the charter are not incorporated into the bill of lading contract or do not affect the buyer's rights; F

(e) that in the present case it is clear that the standard Congenbill form was used which also contained the pre-printed freight clause, 'Freight payable as per Charterparty dated …'. However the freight clause was left blank. No charter party was specifically identified. As such there was no incorporation of the terms of the charter party in any manner. G

[26] With respect we find such submissions contrary to what were said before and by the Court of Appeal. Obviously the plaintiff is now rejecting the findings of the Court of Appeal and its own earlier stand. There is no appeal by the plaintiff against the findings and conclusions made by the Court of Appeal. As such we therefore decline to give any credence to such submissions. Instead we take as a fact that the bills of lading in issue are charter party bills of lading as ordinarily understood in the shipping and banking business. This view is enhanced in that it is not in dispute that the bills of lading covered the shipment of the cargo on the vessel, being a chartered vessel. And the bills of lading in 'Congebill form' have these words clearly stated: 'BILL OF LADING H I

to be used with charter-parties', thereby indicating that they fall within the category of charter party bill of lading.

[27] However whether the letter of credit calls for or permits charter party bill of lading as found by the Court of Appeal is an issue we will deal later in this judgment.

[28] As for the defendant, being the issuer of the letter of credit, it is imperative for it to ensure strict compliance with the terms therein. In fact it is a prudent banking practice requirement. And there is good reason for it.

[29] Strict compliance with terms of a letter of credit is required simply because a bill of lading is usually used by an issuer of letter of credit as a security for a loan it might have given to an applicant of the letter of credit. As such an issuer would not want anything that could reduce the value of the security as for instance a bill of lading subject to charter party and which the issuer had no prior knowledge when granting the credit. As such there may be a lien over the cargo on board by the ship-owner for unpaid freight or other charges owed by the charterer (see *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd [2003] SGCA 34* [2003] 3 SLR 556).

[30] Meanwhile, there are various views expressed and some judicial pronouncements made as to what degree or standard of compliance to the terms of a letter of credit be deemed reasonable with some advocating a liberal approach. Yet the observation in *Banque De L'indochine Et De Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 appears to be still relevant today. This is what Parker J said at p 721:

> I have no doubt that so long as the documents can be plainly seen to be linked with each other, are not inconsistent with each other or with the terms of the credit, do not call for inquiry and between them state all that is required in the credit, the beneficiary is entitled to be paid. I also accept, as did Mr Saville, that Lord Sumner's statement cannot be taken as requiring rigid meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed, but it is slight, and banks will be at risk in most cases where there is less than strict compliance. They may pay on a reasonable interpretation (see *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at pp 285–286) where instructions are ambiguous, but where the instructions from the issuing bank are clear they are obliged to see to it that the instructions are complied with and entitled to refuse payment to the beneficiary unless they are. In *Jalsard*'s case Lord Diplock said, at p 286:
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> The banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description. Both the issuing banker and his correspondent bank have to make quick decisions as to whether a document which has been tendered by the seller complies with the requirements of a credit ...

(See also *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49; *Glencore International AG and another v Bank of China* [1996] 1 Lloyd's Rep 135).

[31] Hence, in view of the strict compliance practice the defendant argued that it was entitled to rely on article 23(a)(vi) of the UCP 500, being 'a permissive provision', in rejecting the bills of lading for non-compliance since they were subject to charter party. The letter of credit only stipulated 'original clean on board' without calls for or permits a charter party bill of lading. And by the same token the defendant said that article 25 of the same UCP 500 was also not applicable.

[32] The relevant portion of article 23(a)(vi) of the UCP 500 reads:

> If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:
>
> …;
>
> and
>
> vi. contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only,
>
> and
>
> …

[33] On plain reading of the above it states, inter alia, that before a bank will accept a shipping document such as a bill of lading the following conditions have to be present:

(a) the letter of credit calls for a bill of lading covering a port-to-port shipment; and

(b) the bill of lading contains no indication that it is subject to a charter party.

[34] Thus, if a bill of lading is subject to a charter party a bank will not accept it unless in the letter of credit itself such kind of bill of lading has been stipulated. If therefore there is indication in the bill of lading that it is subject to charter party the issuing bank can rely on article 23(a)(vi) of the UCP 500 to reject it on account of discrepancy.

[35] In these appeals and as indicated above the bills of lading were accepted as charter party bills of lading while the letter of credit did not indicate that

charter party bill of lading is called for or permitted. The letter of credit only stipulated for 'original clean 'on board' (3 originals plus 3 non-negotiable copies) bills of lading marked 'freight collect' made out to the order notify the applicant.' Such difference according to the defendant and which we are inclined to agree is the first discrepancy in the bills of lading thereby entitling it rely on the said article 23(a)(vi) in refusing to accept them.

[36] In its main judgment the Court of Appeal held that the said article 23(a)(vi) of the UCP 500 was not applicable. No direct reason was given for such conclusion except stating that the letter of credit 'calls for bills of lading' and 'that the plaintiff had fulfilled the terms of the letter of credit upon presentation of a transport document within the definition above'. Unfortunately, in coming to such conclusion the Court of Appeal failed to note that the bills of lading were subject to charter party a condition which was not stipulated in the letter of credit. The Court of Appeal therefore erred in finding that the bills of lading had fulfilled the terms of the letter of credit when they had not done so.

[37] The Court of Appeal also seems to be saying that the mere presentation of the bills of lading irrespective of their nature satisfies the terms of the letter of credit. With respect, such approach is erroneous. As quoted above 'where the instructions from the issuing bank are clear they are obliged to see to it that the instructions are complied with and entitled to refuse payment to the beneficiary …'. Thus, importance should have been given to the fact that the bills of lading were subject to charter party and that the letter of credit did not provide acceptance for such type of bills of lading.

[38] We are also inclined to agree with learned counsel for the defendant that the Court of Appeal in its main judgment erred in finding as a fact that the letter of credit called for or permitted charter party bills of lading 'since it was issued pursuant to the terms of the contract, premised on an express FOB term, …' because:

(a) nothing was stated in the letter of credit to say that it called for or permitted charter party bill of lading;

(b) at best such finding of the Court of Appeal was pure assumption;

(c) it would be quite unfair to cast subsequently the burden upon the defendant to rebut such assumption when it was the buyer which applied for the letter of credit on such terms; and

(d) the plaintiff was privy to the terms of the contract and that of the letter of credit. Prior to loading of the cargo into the vessel it could have demanded for variation of the terms in the letter of credit to be in consonant with those in the contract.

[39] In the concurring judgment of the Court of Appeal the reason for saying that article 23(a)(vi) did not apply was that 'an issuing bank is entitled to rely on the foregoing article if and only if the letter of credit in question requires the production of a bill of lading or other document of title covering a port-to-port shipment which is not subject to a charter party. The credit issued by the instant defendant on its plain reading falls outside the terms of the article.'

[40] With respect we find the interpretation of the said article in the concurring judgment flawed because it reverses the effect of the stipulations and the exception given in the said article. It amounts to saying that the article only applies if a letter of credit stipulates for the production of a bill of lading which is not subject to a charter party. If there is no such stipulation the article does not apply.

[41] Indeed the interpretation as given in the concurring judgment is not in tandem with the views of some learned authors on same subject. In *Documentary Credits* by Raymond Jack, Ali Malek and David Quest (3rd Ed, 2001) at para 8.103 it states:

> Charterparty bills of lading are marine bills of lading which are issued subject to the terms of a charterparty. These are not acceptable unless the credit expressly so provides. This is the effect of Article 23.a.vi and Article 25.

[42] Accordingly for the foregoing reasons our answer to the first part of question (a) is in the negative while our answer to the second part is in the affirmative. Consequently, our foregoing answers alone should allow these appeals. However for completeness we would proceed to address question (b) which was not addressed by the Court of Appeal.

QUESTION (B)

[43] It is apparent in the bills of lading that in the space for signature it is only stated these words: 'For UNICORN MARITIMES (INDIA) PVT LTD', followed by a signature and below it the words: 'AS AGENTS'.

[44] Learned counsel for the defendant argued that merely stating 'As Agent' is not in compliance with article 23(a)(i) and article 25(a)(ii) of the UCP 500. Further, he submitted that banks 'upon honouring the letter of credit will hold title over the goods by retaining the Bill of Lading pending payment by its Customer/Buyer. Therefore it is important to both Issuer Banks and Buyers that the Bill of Lading indicates the name and the capacity of the party on whose behalf the agent is acting'. Hence, for such omission learned counsel said that the defendant should be entitled to reject the bills of lading presented by

the plaintiff on the basis that they did not indicate the name and the capacity of the party on whose behalf the agent was acting for.

[45] For the plaintiff it was contended that since the Court of Appeal found as a fact that the rejection of the bills of lading was under article 23 of the UCP 500 which it held to be not applicable, the defendant should not be allowed subsequently to invoke either article 23 or 25. Further, the notice of rejection of the bills of lading did not rely on article 25 in view of the use of the words: 'CHARTER PARTY B/L NOT ALLOWED' and 'MASTER NOT INDICATED ON B/L'. According to learned counsel the words should have been only the latter.

[46] Article 23(a)(i) of the UCP 500 reads:

> (a) If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:
>
> (i) appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:
>
> — the carrier or a named agent for or on behalf of the carrier, or
>
> — the master or a named agent for or on behalf of the master
>
> Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting.

[47] In article 25(a)(ii) it provides:

> If a Credit calls for or permits a charter party bill of lading, banks will, unless stipulated in the Credit, accept a document, however named, which:
>
> i. …,
>
> and
>
> ii. appears on its face to have been signed or otherwise authenticated by:
>
> — the master or a named agent for or on behalf of the master, or
>
> — the owner or a named agent for on behalf of the owner.
>
> Any signature or authentication of the master or owner must be identified as master or owner as the case may be. An agent signing or authenticating for the master or owner must also indicate the name and the capacity of the party i.e. master or owner, on whose behalf that agent is acting.

[48] With respect the objection in the words used in the rejection notice of the bills of lading is misconceived. Firstly, they are in fact used to indicate the two discrepancies (if at all they are strictly 'discrepancies' since in this case it is more for the failure to comply with the provisions of the UCP) found in the bills of lading and should not to be read collectively. Secondly, the Court of Appeal did not address the issue of omission to indicate on whose behalf the agent was acting. We are therefore of the view that relying on the 'facts' alleged to have been found by the Court of Appeal to say that the defendant could not rely on the relevant provisions is erroneous.

[49] And on perusal of the bills of lading and those provisions cited by learned counsel for the defendant we are inclined to agree with his contention. Whether the bills of lading are subject to charter party or not, on both scores the signatures of the agent therein do not indicate on whose behalf he is acting for. In other words there is nothing which appears on the face of the bills of lading to indicate the name and the capacity of the party on whose behalf the agent was acting for (see *Equitable Trust Co of New York v Dawson Partners Ltd*). And it is also not indicated in the letter of credit that such omission is allowed or permitted. There was therefore a failure to comply with article 23(a)(i) and/or article 25(a)(ii) of the UCP 500.

[50] A similar situation arose in the case of *Southland Rubber Co Ltd v Bank of China* [1997] 3 HKC 569; [1997] HKLRD 1300 which neither of the counsel brought to our attention during submissions. Although in that case it was due to the absence of the word 'carrier' while in the present case it is the absence of the name and capacity of the party on whose behalf the agent was acting, we are of the view that it involves the same issue and principle, namely, the extent of compliance with article 23(a)(i) of the UCP 500. And this is what KK Pang J of the Hong Kong High Court has to say and which we entirely agree:

> The overriding concern in the minds of the panel of experts must be that the institution that has been presented with the bill of lading must not be placed in a position whereby they had to speculate or to make an educated guess of the identity of the carrier. The key words are 'the name of the carrier must appear as such' so that in my view, anything short of using the actual word 'carrier' to identify the party acting as carrier would not have complied with the provisions of article 23(a)(i) of the UCP. I consider one of the fundamental principles in any transaction involving documentary credit to be that of certainty of the identity of the parties involved in the contract of carriage. The approach by this court in the construction of the article is therefore not inconsistent with the views expressed by Lord Diplock in *The Antaios* [1985] AC 191.

[51] For the foregoing reason our answer to question (b) is in the negative. It follows that on this ground as well that we should allow the appeals of the

A defendant.

CONCLUSION

B **[52]** Having answered the questions as we did, we would allow the appeal by the defendant against the refusal by the Court of Appeal to strike out the action of the plaintiff. In other words the action is struck out as originally applied for in encl 36 before the High Court. In turn the appeal against the granting of summary judgment to the plaintiff is also allowed and that the summary judgment so granted by the Court of Appeal pursuant to encl 9 before the High C Court is set aside.

[53] Accordingly for the reasons hereinabove these two appeals are allowed with costs.

D *Appeals allowed with costs.*

Reported by Kohila Nesan

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